

# COVID-19 AND ITS IMPACT IN THE UNITED STATES AND EUROPEAN UNION: A TOOL TO CIRCUMVENT REFUGEE PROTECTION?

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## I. INTRODUCTION

The COVID-19 pandemic is a global health crisis, which has also created an international protection crisis.<sup>1</sup> The virus does not discriminate among its victims, but the impact of the virus is disproportionately affecting the poorest and the most vulnerable people in the world.<sup>2</sup>

This pandemic has brought States to implement exceptional measures to stem the spread of the virus: The United Nations High Commissioner for Refugees (UNHCR) in April estimated that 167 countries around the world had taken safety measures by partially or fully closing their borders—fifty-seven of those made no exception for asylum

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1. *COVID-19 fast becoming protection crisis, Guterres warns Security Council*, UN NEWS (July 2, 2020), <https://news.un.org/en/story/2020/07/1067632>.

2. See Audrey Wilson, *The Corona Virus Threatens Some More Than Others*, FOREIGN POL'Y (Apr. 14, 2020) <https://foreignpolicy.com/2020/04/14/coronavirus-pandemic-humanitarian-crisis-world-most-vulnerable-refugees-migrant-workers-global-poor>.

seekers.<sup>3</sup> These extraordinary measures, in many cases, have been adopted by executive branches of governments through the exercise of public emergency powers.<sup>4</sup> Even though border restrictions may be justified, these powers may be misused<sup>5</sup>: forced returns<sup>6</sup> and push-back, especially at sea,<sup>7</sup> have been reported worldwide. With these border closures and denial of entry comes the restriction of access to asylum procedures.<sup>8</sup>

It has long been recognized that asylum seekers have a right to seek protection at these borders, and that they may not be returned or refouled to a country of persecution and danger.<sup>9</sup> Basic rights of refugees and asylum seekers should be safeguarded from forcible return.<sup>10</sup> “The core principles of refugee protection are being put to the test – but people who are forced to flee conflict and persecution should not be denied safety and protection on the pretext, or even as a side effect, of responding to the virus[.]”<sup>11</sup>

After this short introduction of the topic, an elucidation of the purpose of the article will follow. The first part of this article will discuss basic concepts, such as the definition of “refugee,” who is entitled to that status, and an analysis on the principle of *non-refoulement*. The second part will discuss the impact of the COVID-19 pandemic on asylum

3. *Beware Long-Term Damage to Human Rights and Refugee Rights from the Coronavirus Pandemic*: UNHCR, U.N. HIGH COMM’R FOR REFUGEES (UNHCR) (Apr. 22, 2020), <https://www.unhcr.org/news/press/2020/4/5ea035ba4/beware-long-term-damage-human-rights-refugee-rights-coronavirus-pandemic.html> [hereinafter *Beware Long-Term Damage*].

4. *Autocrats see opportunity in disaster*, ECONOMIST (Apr. 23, 2020), <https://www.economist.com/leaders/2020/04/23/autocrats-see-opportunity-in-disaster>.

5. *See id.*

6. *See generally* *Danger awaits migrant children returned to Mexico and Central America during pandemic*, UN NEWS (May 21, 2020), <https://news.un.org/en/story/2020/05/1064652>.

7. *See, e.g., UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey*, UNHCR (June 12, 2020), <https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html>.

8. *See, e.g., Greece: Grant Asylum Access to New Arrivals*, HUM. RTS. WATCH (Mar. 20, 2020), <https://www.hrw.org/news/2020/03/20/greece-grant-asylum-access-new-arrivals>.

9. Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 19 U.S.T. 1659, 189 U.N.T.S. 137 [hereinafter 1951 Convention]. “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” *Id.*

10. UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, ¶ 2 (Jan. 31, 1994) <https://www.refworld.org/docid/437b6db64.html> [hereinafter *Principle of Non-Refoulement*].

11. *Beware Long-Term Damage*, *supra* note 3 (quoting Filippo Grandi, the current U.N. High Comm’r for Refugees).

seekers in both Europe and the United States (U.S.). The third section of this article will discuss the most recent orders, as of this publishing, and directives issued in those two countries as a response to the pandemic emergency and the impact on migrants. A legal comparative analysis will follow. This article will conclude by discussing whether those measures constitute a violation of human rights and whether governments are using this health emergency as a tool to circumvent international refugee obligations.

In order to fight the virus, many States have implemented border closures, which prevent non-citizens from entering their national territories.<sup>12</sup> While the United States has stopped its asylum processing,<sup>13</sup> Italy has closed its ports to migrant vessels.<sup>14</sup> Those measures constitute obstacles to people in need of international protection.<sup>15</sup> Asylum seekers cannot claim refugee protection if they remain in their country of origin.<sup>16</sup> Whether those measures constitute a violation of human rights and whether governments are using the COVID-19 emergency as an excuse to reduce the migrant flow in their countries are crucial questions that must be examined in light of the legal framework regulating the right to seek asylum and the limitations to that right during a state of emergency.<sup>17</sup>

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12. Andrea Salcedo et al., *Coronavirus Travel Restrictions Across the Globe*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/article/coronavirus-travel-restrictions.html>.

13. See JORGE LOWEREE ET AL., THE IMPACT OF COVID-19 ON NONCITIZENS AND ACROSS THE U.S. IMMIGRATION SYSTEM 1, 18 (2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_impact\\_of\\_covid-19\\_on\\_noncitizens\\_and\\_across\\_the\\_us\\_immigration\\_system.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_impact_of_covid-19_on_noncitizens_and_across_the_us_immigration_system.pdf).

14. See *Italy closes ports to refugee ships because of coronavirus*, AL JAZEERA (Apr. 8, 2020), <https://www.aljazeera.com/news/2020/04/italy-closes-ports-refugee-ships-coronavirus-200408091754757.html> [hereinafter *Italy closes ports*].

15. Cf. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, ¶ 8 (Jan. 26, 2007), <https://www.refworld.org/docid/45f17a1a4.html> [hereinafter UNHCR Advisory Opinion].

16. 1951 Convention, *supra* note 9, art. I(A)(2).

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

*Id.*

17. See generally LOWEREE, *supra* note 13; see also *Italy closes ports*, *supra* note 14.

### A. Refugee Status and the Principle of Non-refoulement

The first effort to define refugees was made by the international community after the fall of the Ottoman Empire and World War I, which left a legacy of one to two million refugees.<sup>18</sup> In 1933, the League of Nations created the Convention on the International Status of Refugees, which was ratified by only nine states and did not provide a clear definition of “refugee,”<sup>19</sup> but had introduced the concept of *non-refoulement* for the first time in the international scenario.<sup>20</sup>

The modern refugee law traces its roots in the aftermath of World War II, when there was a need for a new legally binding international instrument defining the status of refugee.<sup>21</sup> The Convention Relating to the Status of Refugees (1951 Convention) was adopted on July 28, 1951 and entered into force on April 21, 1954.<sup>22</sup> As a post-World War II instrument, the Convention was limited in scope to persons who had become refugees “[a]s a result of events occurring before 1 January 1951.”<sup>23</sup>

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18. Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT’L REV. RED CROSS, 727, 727 (2001) [https://www.icrc.org/en/doc/assets/files/other/727\\_738\\_jaeger.pdf](https://www.icrc.org/en/doc/assets/files/other/727_738_jaeger.pdf).

19. Convention Relating to the International Status of Refugees, Oct. 28, 1933, CLIX 3663, 159 L.N.T.S. 3663, ch. 1, art. 1. The Convention of 28 October 1933 applied only “to Russian, Armenian and assimilated refugees . . .” *Id.*

20. *Id.* art. 3(1).

Each of the contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been [authorized] to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

*Id.*

21. UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, p. 5, U.N. Doc., HCR/1P/4/ENG/REV.3 (2011) [hereinafter HANDBOOK].

22. *Id.*

23. 1951 Convention, *supra* note 9, art. 1(A)(2).

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

*Id.*

With the passage of time and emergence of new refugee situations unrelated to pre-1951 events, the 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol) amended the 1951 Convention by removing geographical and temporal restrictions on refugee classifications, while simultaneously incorporating the obligations and definitions of the Convention.<sup>24</sup>

The 1951 Convention indicated to whom the term “refugee” shall apply and defined the principle of *non-refoulement*, and the rights afforded to those granted the refugee status.<sup>25</sup>

Thus, it is crucial to discern the difference between an asylum seeker and a refugee.<sup>26</sup>

The term “refugee” refers to an individual fleeing his country because of an armed conflict or persecution.<sup>27</sup> A refugee has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . .” and because of those reasons is unable or afraid to return to the country of his nationality.<sup>28</sup> An individual is granted the refugee status when the criteria set forth in the above definition are satisfied.<sup>29</sup>

On the other side, the term “asylum seeker” refers to an individual who claims to be a refugee, but whose claim has not been evaluated yet.<sup>30</sup> Thus, an individual is an asylum seeker as long as his application is pending; every refugee is initially an asylum seeker, but not every asylum seeker will obtain the status of refugee.<sup>31</sup>

Article 1(A)(2) of the 1951 Convention indicates to whom the term “refugee” shall apply, and very peculiarly in its formulation is the phrase “well-founded fear of being persecuted[.]”<sup>32</sup> which involves a subjective element: fear.<sup>33</sup> This means that, to determine the refugee status, an evaluation of the applicant’s statements will be primarily required, even though it is supported by an objective situation.<sup>34</sup> An assessment of

24. HANDBOOK, *supra* note 21, at p. 6; Protocol Relating to the Status of Refugees, art. 1, ¶ 3, Jan. 31, 1967, 606 U.N.T.S. 267.

25. HANDBOOK, *supra* note 21, at p. 6.

26. Compare 1951 Convention, *supra* note 9, art. 1(A), with UNHCR, PROTECTION TRAINING MANUAL FOR EUROPEAN BORDER AND ENTRY OFFICIALS, p. 4 (Apr. 1, 2011) [hereinafter TRAINING MANUAL].

27. See 1951 Convention, *supra* note 9, art. 1(A).

28. *Id.*

29. HANDBOOK, *supra* note 21, at p. 9.

30. TRAINING MANUAL, *supra* note 26, at p. 4.

31. *Id.*

32. 1951 Convention, *supra* note 9, art. 1(A)(2).

33. HANDBOOK, *supra* note 21, at p. 11.

34. *Id.* at p. 11. “This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation.” *Id.*

credibility is thus necessary, and all the circumstances must be taken into account in order to understand the applicant's situation—his personal background, membership of a particular religion, racial or political group, and personal experience.<sup>35</sup> The determination of whether an applicant's fear is "well-founded" requires determining if there is a reasonable possibility, and not only a mere chance or remote possibility, that he would face persecution in the country of origin.<sup>36</sup>

In the text of the 1951 Convention, there is no specific provision relating to minors and it must be applied to all individuals regardless of their age.<sup>37</sup> Some difficulties may thus arise when determining if the minor has a "well-founded fear," especially in the case of an unaccompanied minor.<sup>38</sup> This issue will have to be determined by taking into account "the degree of his mental development and maturity," and in order to do so, it may be necessary to enroll "experts conversant with child mentality."<sup>39</sup> When determining the minor's mental maturity, circumstances including the situation in the country of origin and family and cultural background must be taken into account.<sup>40</sup> Sometimes, the inability or difficulty of the child to communicate fear is sidestepped by imputing the fear of the parents to the child.<sup>41</sup> Where this is not an option, to establish the child's well-founded fear, all the known circumstances have to be taken into account.<sup>42</sup> The decision-makers should also give the child's testimony the benefit of the doubt with respect to evaluating whether the evidence satisfies the elements of the refugee definition.<sup>43</sup>

### *B. The Principle of Non-refoulement Under International Refugee Law*

A fundamental concept of international protection lies in the principle of *non-refoulement*, which can be found in Article 33 of the 1951 Convention and binds all States party to the 1967 Protocol.<sup>44</sup>

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35. *Id.* at p. 12.

36. *Id.*

37. HANDBOOK, *supra* note 21, at p. 41.

38. *Id.* "If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who request refugee status, the minor's own refugee status will be determined according to the principle of family unity." *Id.*

39. *Id.*

40. *Id.*

41. HANDBOOK, *supra* note 21, at p. 41.

42. *See id.*

43. *Id.* at 35, ¶ 219.

44. 1951 Convention, *supra* note 9, art. 33. Article 1(1) of the 1967 Protocol provides that the States party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention. *Id.* art. 1, ¶ 1; UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol 1–5 (July 28, 1951) <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [hereinafter States Parties] (stating that the Protocol is binding on all States parties).

Article 33(1) of the 1951 Convention states, “[n]o Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>45</sup> This provision applies to any alien who meets the inclusion criteria of the refugee definition of Article 1(A)(2) of the 1951 Convention and does not meet any exclusion provisions.<sup>46</sup> Thus, the refugee recognition is declaratory and not constitutive.<sup>47</sup> An individual does not become a refugee because he is recognized as one; instead, he is granted this status because he is a refugee.<sup>48</sup> This principle applies not only to recognized refugees, but also to those who have not been formally recognized as refugees yet.<sup>49</sup>

The 1951 Convention does not imply a right of the alien to be granted asylum in a certain State, but it applies “not only in respect of the country of origin but to any country where a person has a reason to fear persecution.”<sup>50</sup>

There are few restrictions to the principle of *non-refoulement* listed in Article 33(2):

The benefit of the present provision [i.e., Article 33(1) referred to above] may not however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>51</sup>

This provision, however, does not affect the States’ obligations under international human rights law, which does not allow any

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45. 1951 Convention, *supra* note 9, art. 33, ¶ 1.

46. UNHCR Advisory Opinion, *supra* note 15, ¶ 6. Exclusion clauses are enumerated circumstances under which a person is excluded from application of the 1951 Convention even though the positive criteria of the inclusion clauses are met. HANDBOOK, *supra* note 21, at 7, ¶ 31.

47. UNHCR Advisory Opinion, *supra* note 15, ¶ 6.

48. HANDBOOK, *supra* note 21, at 7, ¶ 28.

49. UNHCR, *Non-Refoulement No. 6* (XXVIII) - 1977, ¶ (c), U.N. DOC. A/32/12/Add.1 (Oct. 12, 1977).

Reaffirms the fundamental importance of the observance of the principle of *non-refoulement* - both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.

*Id.*

50. UNHCR, Note on Non-Refoulement (Submitted by the High Comm’r), U.N. DOC EC/SCP/2, ¶ 4 (Aug. 23, 1977).

51. *Id.*; 1951 Convention, *supra* note 9, art. 33, ¶ 2.

exception: the host State will be barred from removing a refugee from its territory if this would have as a consequence exposing him to a substantial risk of torture or other forms of irreparable harm.<sup>52</sup>

The principle of *non-refoulement* has an absolute and non-derogable character.<sup>53</sup> The principle is reflected in Article 7(1) of the 1967 Protocol,<sup>54</sup> regarding the provision as one which prohibits any reservations or exclusions, and by the U.N. General Assembly which has compelled States “to respect scrupulously the fundamental principle of *non-refoulement*, which is not subject to derogation.”<sup>55</sup>

Lastly, the principle of *non-refoulement* has been recognized by the UNHCR as a rule of customary international law.<sup>56</sup> Article 38(1)(b) of the Statute of the International Court of Justice lists “international custom, as evidence of a general practice accepted as law.”<sup>57</sup> For a rule to be crystallized into customary law, two forms of evidence are required: (1) the conduct of States consistent with such rule and (2) the States’ *opinio juris*, which is the recognition of its normative character.<sup>58</sup> This is noticeable from the incorporation of the *non-refoulement* principle in several international treaties.<sup>59</sup> As a rule of customary international law, it is binding on all States, including those that are not party to the 1951 Convention or to the 1967 Protocol.<sup>60</sup> There is either an express or a tacit recognition that the principle has a normative character.<sup>61</sup>

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52. See OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS. (OHCHR), *The Principle of Non-Refoulement Under International Human Rights Law*, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (last visited Oct. 23, 2020).

53. UNHCR Advisory Opinion, *supra* note 15, at 5.

54. Protocol Relating to the Status of Refugees, *supra* note 24, art. 7(1).

At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

*Id.* art. 7(1).

55. G.A. Res. 51/75, ¶ 3 (Feb. 12, 1997).

56. See *Principle of Non-Refoulement*, *supra* note 10, ¶ 3.

57. U.N. Charter art. 38, ¶ 1(b).

58. Niels Peterson, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT’L LAW REV. 275, 278 (2007).

59. *Principle of Non-Refoulement*, *supra* note 10, ¶ 3.

60. *Id.* ¶ 5.

61. *Id.* ¶ 6.



In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>62</sup>

## II. THE UNITED STATES

### A. Background

The United States is a federal republic whose chief of state and head of government has been Donald Trump since January 2017.<sup>63</sup>

At the base of the American constitutional system is separation of the legislative, executive, and judicial powers among distinct and independent bodies.<sup>64</sup> The system of checks and balances was created in order to ease the concern that no part of government should acquire too much power, and to ensure that the President, the Supreme Court, and each house of the Congress do not have exclusive control over certain government functions.<sup>65</sup>

The United States is a nation which was built partly by immigrants,<sup>66</sup> however, the U.S. immigration policy has changed over time between more permissive and more restrictive systems.<sup>67</sup>

With the ratification of the 1967 Protocol to the 1951 Convention, the United States has joined the international refugee regime taking on

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62. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 186 (June 27).

63. Wilbur Zelinsky et al., *United States*, ENCYC. BRITANNICA, <https://www.britannica.com/place/United-States> (last updated Sept. 27, 2020).

64. The Editors of Encyclopedia Britannica, *Separation of Powers*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/separation-of-powers> (last updated Apr. 10, 2020).

65. The Editors of Encyclopedia Britannica, *Checks and Balances*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/checks-and-balances> (last updated Aug. 26, 2019).

66. AM. IMMIGR. COUNCIL, *IMMIGRANTS IN THE UNITED STATES I* (2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_the_united_states.pdf).

67. *History of U.S. Immigration Laws*, FAIR, <https://www.fairus.org/legislation/reports-and-analysis/history-of-us-immigration-laws> (last visited Sept. 4, 2020).

the Convention's obligations,<sup>68</sup> and since then has successfully integrated more than three million refugees from all the corners of the world.<sup>69</sup>

With the Refugee Act of 1980, Congress has incorporated the definition of "refugee" given by the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, into national law as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, political opinion.<sup>70</sup>

Though not a part of the 1951 Convention concerning the Status of Refugees,<sup>71</sup> the United States is a party of three treaties pertinent to the principle of *non-refoulement*:

- 1) the 1967 Protocol Relating to the Status of Refugees;<sup>72</sup>
- 2) the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>73</sup> and
- 3) the 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>74</sup>

The principles of the 1967 Refugee Protocol, including the *non-refoulement* obligation, were implemented into the Refugee Act of 1980 and codified in several sections of Title 8 of the U.S. Code.<sup>75</sup> The Supreme Court of the United States stated that "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees."<sup>76</sup>

68. States Parties, *supra* note 44, at 4.

69. Harvard Immigration and Refugee Clinical Program, *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security, & Building the U.S. Economy Through Refugee Admissions*, 5 TEX. A&M L. REV. 155, 158 (2018).

70. Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(a)(42).

71. 1951 Convention, *supra* note 9, at 6; States Parties, *supra* note 44, at 1.

72. See generally Protocol Relating to the Status of Refugees, *supra* note 24, art. 7(1).

73. See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT].

74. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

75. See Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952), amended by 8 U.S.C. § 1101 (1980); See generally Protocol Relating to the Status of Refugees, *supra* note 24.

76. *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

The Immigration and Nationality Act (INA) of 1952,<sup>77</sup> despite the U.S. accession to the 1967 Protocol, did not include any obligation regarding the principle of *non-refoulement* until the Refugee Act of 1980 was enacted.<sup>78</sup>

Before the Refugee Act of 1980 was enacted, the INA “authorize[d]” the Attorney General to withhold deportation of any alien within the United States,<sup>79</sup> but this amendment substituted the discretionary authority of the Attorney General to withhold deportation of a foreign individual with mandatory language, stating that he “may not remove an alien.”<sup>80</sup>

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.<sup>81</sup>

The protection from deportation is also available to aliens who are likely to be tortured in the country of removal under the CAT.<sup>82</sup> Article 3 of the CAT states that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>83</sup> Torture is defined as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>84</sup>

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77. See Immigration and Nationality Act § 101 (codified as amended by 8 U.S.C. § 1101 (1980)).

78. See United States Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in the INA).

79. See Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 167 (1952), amended by 8 U.S.C. § 1253(h) (1980). (“The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.”). *Id.*

80. I.N.A. § 241(b)(3), 8 U.S.C.S. § 1231(b)(3)(A), (“Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). *Id.*

81. *Id.*

82. UNCAT, *supra* note 73, art. 3, ¶ 1.

83. *Id.* art. 3, ¶ 1.

84. 8 C.F.R. § 1208.18(a)(1) (1999).

The Department of Homeland Security (DHS) has set procedures in order to handle situations in which an alien, who is about to be removed, expresses a fear of torture.<sup>85</sup> The alien in those circumstances will be interviewed by an officer in order to determine if he has a “credible fear of persecution or torture.”<sup>86</sup> If the alien is found to have a credible fear of torture, the officer will inform an immigration judge for full consideration of his claim.<sup>87</sup> This protection will be granted “if the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture.”<sup>88</sup>

The ICCPR is different from the previously cited Conventions since it refers to expulsion in the context of regular immigration proceedings.<sup>89</sup> Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>90</sup>

Even though the United States ratified this treaty in 1992, attached to the ratification is a reservation declaring that the provisions of Articles 1 through 27 of the Covenant are not self-executing.<sup>91</sup>

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85. 8 C.F.R. §235.3 (b)(4) (1998).

If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance [with 8 C.F.R. § 208.30]. The examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern, and to establish the alien’s inadmissibility.

*Id.*

86. 8 C.F.R. § 208.30(d). “The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture . . . .” *Id.*

87. *Id.* § 208.30(f).

88. § 208.30.16(c)(4).

89. See ICCPR, *supra* note 74, art. 13.

90. *Id.* art. 13.

91. FAQ: THE COVENANT ON CIVIL & POLITICAL RIGHTS (ICCPR), ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> (last updated Apr. 2019).

### B. *U.S. and Asylum Seekers Nowadays: A Changing Trend*

The protection of asylum seekers is a complex area of immigration law, which has recently been a subject of debate, especially regarding the efforts of the Trump administration to tighten the asylum seekers.<sup>92</sup>

Until recently, the United States has been a “global leader in the resettlement of refugees,” whose numbers have grown enormously over the past decade.<sup>93</sup> However, in 2017 for the first time since the adoption of the 1980 Refugee Act, the United States settled fewer refugees than the rest of the world.<sup>94</sup>

The number of refugees the United States admits each year is determined by the President in “appropriate consultation” with Congress.<sup>95</sup> In the fiscal year of 2017, the number of refugees admitted was lowered from 110,000 (set under Obama Administration)<sup>96</sup> to 50,000 and lowered once again to 45,000 in 2018, to 30,000 in 2019, and finally to 18,000 for the fiscal year of 2020.<sup>97</sup>

### C. *COVID-19 and Emergency Powers*

On March 20, 2020, as COVID-19 was spreading all around the globe, the United States Centers for Disease Control and Prevention (CDC) issued an Emergency Interim Final Order (EIFO), an order temporarily suspending the entry of non-citizens without valid documents travelling from Mexico or Canada to the United States.<sup>98</sup>

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92. See generally Yeganeh Torbati & Mica Rosenberg, *Trump Directs Officials to Toughen Asylum Rules*, <https://www.reuters.com/article/us-usa-immigration-asylum/trump-directs-officials-to-toughen-asylum-rules-idUSKCNIS603M> (last updated Apr. 29, 2019).

93. AM. IMMIGR. COUNCIL, AN OVERVIEW OF U.S. REFUGEE LAW AND POLICY I (Jan. 8, 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/an\\_overview\\_of\\_us\\_refugee\\_law\\_and\\_policy.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_us_refugee_law_and_policy.pdf) [hereinafter OVERVIEW].

94. Phillip Connor & Jens Manuel Krogstad, *For the First Time, U.S. Resettles Fewer Refugees than rest of the World*, PEW RES. CTR. (July 5, 2018), <https://www.pewresearch.org/fact-tank/2018/07/05/for-the-first-time-u-s-resettles-fewer-refugees-than-the-rest-of-the-world>.

95. Annual Admission of Refugees and Admission of Emergency Situation Refugees, 8 U.S.C. § 1157(a)(2) (2011).

96. See OVERVIEW, *supra* note 93, at 3.

97. ANDORRA BRUNO, CONG. RES. SERV., IN 11196, FY2020 REFUGEE CEILING AND ALLOCATIONS I (Nov. 7, 2019), <https://fas.org/sgp/crs/homesec/IN11196.pdf>.

98. See Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559, 16,559, 42 C.F.R. 71 (Mar. 24, 2020) [hereinafter Suspension of Persons into the United States].

Following this CDC Order, the DHS started summarily deporting thousands of aliens arriving at the borders.<sup>99</sup>

Borders closure and restrictions on the entry of non-nationals are measures that have been adopted by a multitude of States in response to the COVID-19 pandemic.<sup>100</sup>

The EIFO was issued under Title 42 Section 265 of the U.S. Code, which authorizes the Surgeon General to suspend introduction of persons or goods into the United States on public health grounds.<sup>101</sup> An amendment and extension of the original order was issued that applied directly to land travel from Mexico and Canada, and “covered aliens,”<sup>102</sup> typically aliens who lack valid documentation for entry in the United States.

The EIFO issued on March 20, 2020 broadly defines introduction of persons in the United States as a “movement of a person from a foreign country” into the United States in a manner that “present[s] a risk of transmission of the communicable disease to persons or property, even if the communicable disease has already been introduced, transmitted, or is spreading within the United States.”<sup>103</sup> It is not necessary that the person actually be diagnosed with a COVID-19 infection; furthermore, the rule authorizes the suspension of introduction of “persons or class of persons” into the United States.<sup>104</sup>

Since the rule specifically refers to aliens arriving at U.S. borders without documentation, the rule mostly affects individuals seeking

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99. See *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS AND BORDER PROT. (July 9, 2020), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (last modified Sept. 4, 2020).

100. Salcedo et al., *supra* note 12.

101. See *Suspension of Persons into the United States*, *supra* note 98, at 16,563; see also 42 U.S.C. § 265.

If the Secretary determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

*Id.*

102. Amendment and Extension of Order Suspending Introduction of Certain Persons from Countries where a Communicable Disease Exists, 85 Fed. Reg. 31,503, 31,503 (Mar. 20, 2020).

103. See *Suspension of Persons into the United States*, *supra* note 98, at 16,563.

104. See *id.* at 16,567.

protection from persecution at the southern borders of the United States.<sup>105</sup> The notice of EIFO explicitly states that “the immediate suspension of the introduction of these aliens requires the movement of all such aliens to the country from which they entered into the United States, or their country of origin, or another location as practicable, as rapidly as possible.”<sup>106</sup> The measures taken by the DHS as a result of the EIFO effectively deny the possibility of seeking asylum at U.S. borders.<sup>107</sup>

The only reference to protection is contained in a leaked Custom and Border Protection memorandum, known as COVID-19 CAPIO, which stated that, if aliens make “an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to, [they] will be taken to the designated station and referred to USCIS.”<sup>108</sup>

An aspect of the EIFO that deserves to be analyzed is the treatment of unaccompanied children. The United States Trafficking Victims Protection Reauthorization Act (TVPRA) is a federal law that imposes enhanced requirements for the processing of unaccompanied children arriving at the U.S. border.<sup>109</sup> The TVPRA requires that, within forty-eight hours of apprehension of an unaccompanied child, a determination be made that he or she:

- 1) has not been a victim or are at risk of being trafficked;
- 2) does not have a fear to return to his or her country of origin; and
- 3) can independently decide to withdraw his or her application for admission to the United States and return voluntarily to his country of origin.<sup>110</sup>

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105. See Torbati & Rosenberg, *supra* note 92.

106. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,067 (Mar. 20, 2020) [hereinafter *Suspending Introduction of Certain Persons*].

107. See *id.* at 17,067.

108. U.S. CUSTOMS AND BORDER PATROL (CBP), *COVID-19 CAPIO Memorandum 4*, <https://assets.documentcloud.org/documents/6824221/COVID-19-CAPIO.pdf> (last visited Sept. 5, 2020); Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law*, PROPUBLICA (April 2, 6:30 p.m.), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

109. Enhancing Efforts to Combat the Trafficking of Children, 8 U.S.C. § 1232(a)(1) (2011).

110. *Id.* at (a)(2)(A).

Instead, the COVID-19 CAPIO notes that, “a minor under the age of 18 and not accompanied by a relative” makes him “amenable to immediate expulsion.”<sup>111</sup>

While before unaccompanied minors would be transferred to the Department of Health and Human Services for a review of their situation, now they are expelled within hours from arriving on American soil.<sup>112</sup>

The EIFO operates outside the normal immigration removal process and “renders asylum rights *de facto* impossible to exercise.”<sup>113</sup> The EIFO disregards the protections and procedures settled by the 1980 Refugee Act and the special measures for unaccompanied minors under the TVPRA.<sup>114</sup> It precludes *non-refoulement* protection and asylum.<sup>115</sup> The Office of the UN High Commissioner for Refugees has recently stated that a public health emergency cannot justify “blanket measure[s] to preclude the admission of refugees or asylum-seekers.”<sup>116</sup>

The principle of *non-refoulement* cannot be derogated: the principle is absolute and neither the 1951 Convention nor its 1967 Protocol contain any derogation clauses.<sup>117</sup>

The United States federal law states that “[a]ny alien who is physically present in the United States or who arrives in the United States” may apply for asylum.<sup>118</sup> The ICCPR in Article 4(1) contains a specific provision authorizing derogation of the principle of *non-refoulement* in states of emergency.<sup>119</sup> United States federal law

111. See COVID-19 CAPIO Memorandum 4, *supra* note 108.

112. See Caitlin Dickerson, *10 Years Old, Tearful and Confused After a Sudden Deportation*, N.Y. TIMES, <https://www.nytimes.com/2020/05/20/us/coronavirus-migrant-children-unaccompanied-minors.html> (last updated May 21, 2020).

113. Junteng Zheng, *Pandemic, Emergency Power, and Implications on the Right to Seek Asylum*, 24 AM. SOC'Y OF INT'L L. 13, (May 28, 2020), <https://www.asil.org/insights/volume/24/issue/13/pandemic-emergency-power-and-implications-right-seek-asylum>.

114. See generally *Suspension of Persons into the United States*, *supra* note 98; see also 8 U.S.C. § 1232(a)(1).

115. See *Suspension of Persons into the United States*, *supra* note 98 at 17,067.

116. UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, ¶ 6, (Mar. 16, 2020), <https://data2.unhcr.org/en/documents/download/75349> [hereinafter *Key Legal Considerations*].

117. *Id.*; see 1951 Convention, *supra* note 9, art. 33, ¶ 1; see generally *States Parties*, *supra* note 44.

118. 8 U.S.C. § 1158(a)(1).

119. ICCPR, *supra* note 74, art. 4, ¶ 1.



authorizes the President to declare a national emergency by means of an executive order which must be transmitted to the Congress.<sup>120</sup> However, the EIFO was issued under Title 42 of the U.S. Code, which does not allow derogation from human rights obligations.<sup>121</sup> Furthermore, the emergency measures must be proportionate and “limited to the extent strictly required by the exigencies of the situation.”<sup>122</sup> The EIFO refers to the limited space and medical resources in the facilities where aliens are taken into “congregate settings” as a reason for the suspension, claiming that doing otherwise “would increase the already serious danger to the public health.”<sup>123</sup> It is unclear whether less extreme measures could have been adopted in order to combat the virus.<sup>124</sup> On March 31, 2020, the UNHCR issued “Key Protection Messages” that stated “a country can both secure public health and the rights of asylum seekers to protection.”<sup>125</sup> For example, States can impose measures at the border, such as health screening, testing, quarantine and self-isolation to manage health risk, while also respecting the principle of *non-refoulement*.<sup>126</sup>

Even if the purpose of the EIFO is to deal with the COVID-19 pandemic, it cannot contravene human rights. The EIFO must be consistent with both U.S. federal and international law, and even during a world crisis, the right to seek asylum, principle of *non-refoulement*, and protection of unaccompanied children cannot be put aside.<sup>127</sup> Fighting a crisis by infringing fundamental human rights can only lead to a bigger crisis.<sup>128</sup>

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In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

*Id.*

120. 50 U.S.C. §1631.

121. See 42 U.S.C §§ 265, 268; see also *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

122. OHCHR, General Comment No. 29: Article 4: Derogations during a State of Emergency, ¶ 4 (Aug. 31, 2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11 <https://digitallibrary.un.org/record/451555?ln=en#record-files-collapse-header>.

123. See *Suspending Introduction of Certain Persons*, *supra* note 106, at 17,061.

124. See *id.* at 17,061.

125. Press Release, UNHCR, The COVID-19 Crisis: Key Protection Messages 1 (Mar. 31, 2020), <https://data2.unhcr.org/en/documents/details/75555> [hereinafter Press Release].

126. *Id.*

127. See *generally id.* at 1.

128. See U.N., COVID-19 AND HUMAN RIGHTS WE ARE ALL IN THIS TOGETHER 2 (Apr. 2020), <https://unsdg.un.org/sites/default/files/2020-04/COVID-19-and-Human-Rights.pdf>.

## III. EUROPE

## A. Background

The European Union is a political and economic union of twenty-seven Member States which was established when the Treaty of Maastricht entered into force in 1993.<sup>129</sup> The treaty is comprised of three pillars: the European Community, the common foreign and security policy, and cooperation in the field of justice and home affairs.<sup>130</sup> It was meant—amongst several objectives—to enhance economic and political integration between the Member States and to advance cooperation in the fields of immigration and asylum.<sup>131</sup> The elimination of border controls and the consequent freedom of movement of people across national borders pushed for new Europe-wide asylum policies.<sup>132</sup>

Two subsequent treaties revised the asylum policies of the European Union.<sup>133</sup> The Treaty of Amsterdam, entered into effect in 1999, granted EU institutions new legislative powers in the field of asylum and set a timeline of five years before the European Council was required to set and enforce criteria and mechanisms regarding the application for asylum.<sup>134</sup> “The decree of legal integration, supranational political authority, and economic integration in the EU greatly surpasses that of other international organizations.”<sup>135</sup>

The Treaty of Amsterdam was followed by the Treaty of Lisbon in 2009, which made uniform status and co-decision as the standard procedure.<sup>136</sup>

Between 2011 and 2014, following an increasing number of immigrants arriving at the European borders, the European Union reformed its legislation on asylum, namely the Common European

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129. INA SOKOLSKA, THE MAASTRICHT AND AMSTERDAM TREATIES, EUR. PARL. DOC., 1–2 (Nov. 2019), [https://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.1.3.pdf](https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf) (last visited July 3, 2020).

130. *Id.* at 1–2.

131. William H. Buiter et. al., *Excessive Deficits: Sense and Nonsense in the Treaty of Maastricht*, 8 ECON. POL. 57, 58 (1993); see also Gisbert Brinkmann, *The Immigration and Asylum Agenda*, 10 EUR. L. J. 182, 183, (2004).

132. Julia Gelatt, *Schengen Free Movement People Across Europe*, MIGRATION POLICY INST. (2005) <https://www.migrationpolicy.org/article/schengen-and-free-movement-people-across-europe>.

133. *Migration and Asylum: A Challenge for Europe*, EUR. PARL. Doc. P.E. 600.414 at 1 (Jun. 2018) [https://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL\\_PERI\(2017\)600414\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf) [hereinafter *Migration and Asylum*].

134. *Id.* at 3.

135. MATTHEW J. GABEL, EUROPEAN UNION (Encyc. Britannica, Jan. 31, 2020), <https://www.britannica.com/topic/European-Union>.

136. *Migration and Asylum*, *supra* note 133, at 4.

Asylum System (CEAS), moving from minimum standards<sup>137</sup> to a common procedure for assessing asylum application.<sup>138</sup> CEAS is made of several directives and regulations and states a set of common standards to ensure that asylum seekers are treated equally everywhere in the EU territory.<sup>139</sup> CEAS is based on the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol,<sup>140</sup> and thus affirms the principle of *non-refoulement* under which Member States are prohibited from returning refugees or asylum seekers back to “territories where [their] . . . life or freedom would be threatened on account of [their] . . . race, religion, nationality, membership of a particular social group or political opinion.”<sup>141</sup>

The right to asylum is enshrined in Article 18 of the Charter of Fundamental Rights of the European Union. Article 19 prohibits returning a person to a country “where there is a serious risk that he or she would be subjected to . . . torture or other inhuman or degrading treatment or punishment.”<sup>142</sup>

The European Court of Justice (ECJ) has a supranational legal authority, interpreting community law and rules on proceeding against Member States that have not fulfilled their obligations under EU law.<sup>143</sup> European law, which includes treaty provisions, is directly binding on citizens and overrides national laws in case of conflicts.<sup>144</sup> Thus, the ECJ ensures the correct application of asylum law and the Charter of Fundamental Rights of the European Union,<sup>145</sup> which establishes—other than the rights to asylum and protection in case of removal, expulsion, or extradition—the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), rights of the child (Article 24) and the right to an effective remedy and fair trial (Article 47).<sup>146</sup>

When asylum seekers arrive at the European land and water borders, they are submitted to rules which must adhere to EU asylum

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137. *Id.* at 5.

138. *Id.*; Theresa Papademetriou, *Refugee Law Policy: European Union*, LIBR. CONG., <https://www.loc.gov/law/help/refugee-law/europeanunion.php> (last updated June 21, 2016).

139. Papademetriou, *supra* note 138.

140. *Id.*

141. 1951 Convention, *supra* note 9, art. 33.

142. Charter of Fundamental Rights of the European Union, arts. 18–19, 2000 O.J. (C 364) 1 [hereinafter CFR].

143. Jonas Tallberg, *Delegation to Supranational Institutions: Why, How, and with What Consequences?*, 25 W. EUR. POL. 23, 23 (2002).

144. Sinisa Rodin, *Constitutional Restraints of Supranational Judicial Activism — a Challenge to European Integration*, 34 CROATIAN POL. SCI. REV. 104, 105 (1997).

145. CFR, *supra* note 142, at art. 1.

146. *Id.* arts. 4, 24, 47.

legislation.<sup>147</sup> Member States can adopt more favorable standards to qualify an alien in need of international protection, but only as long as they comply with EU rules.<sup>148</sup>

The Dublin Regulation lays out the criteria for examining an asylum application and determines which Member State is responsible.<sup>149</sup> If the Member State determining the responsibility finds that the Member State that would be responsible due to this regulation brings a risk of “inhuman or degrading treatment,” and the applicant cannot be transferred to any other Member State that would usually be responsible on the basis of the Regulation’s criteria, then under Article 3(2), the determining Member State is responsible.<sup>150</sup> The criteria that are applied are the presence of family, the possession of a visa residence permit, and the entry into a Member State.<sup>151</sup> According to Articles 9 and 10, if the applicant has a family member in a Member State, either benefiting from the refugee protection or awaiting for a decision on his application, then the Member State where the family member is located bears the burden of responsibility for the asylee.<sup>152</sup> Article 11 of the Dublin Regulation tries to ensure that family members that apply for asylum in the same Member State are not split up.<sup>153</sup> According to Article 12, if a Member State has issued a residence document, then it will be the State responsible for application of the asylee.<sup>154</sup> The application must be examined by a sole Member State which the criteria designate as the responsible one.<sup>155</sup> If by applying the previous criteria, no Member State can be designated as the responsible one, it will be the first State in which the application for international protection was lodged.<sup>156</sup>

In any case, it must be determined on a case-by-case basis whether an individual applying for international protection is a refugee within the meaning of Article 1(a) of the 1951 Convention Relating to the Status of Refugees.<sup>157</sup>

147. Directive 2013/32, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast), 2013 O.J. (L 180) 60, 83.

148. *Id.* at 67.

149. Regulation 604/2013 of Jun. 26, 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast), 2013 O.J. (L 180) 31, 37 [hereinafter Criteria and Mechanisms].

150. *Id.*

151. *Id.* at 9–13.

152. *See id.*

153. *See id.*

154. Criteria and Mechanisms, *supra* note 149.

155. *See id.* at 37.

156. *See id.*

157. Papademetriou, *supra* note 138.

### B. *The European Response to COVID-19 Crisis*

In the attempt to restrain the advancement of COVID-19, the European Union has closed its external borders and restricted freedom of movement between its internal borders.<sup>158</sup> Several Member States have also adopted emergency measures in order to curb the spread of coronavirus by closing their ports to asylum seekers<sup>159</sup> and imposing mandatory confinement in asylum reception centers.<sup>160</sup> Thus, there is an actual risk that those measures will have a negative impact on the asylum seekers.<sup>161</sup>

Under European law, Member States have not only a right to protect their borders<sup>162</sup> and safeguard public health, but also a duty to protect fundamental rights.<sup>163</sup> Member States must also ensure that restrictions of mobility across borders are not discriminatory and do not prevent people from seeking international protection.<sup>164</sup> Member States, thus, have to respect the right to asylum stated by Article 18 of the Charter of Fundamental Rights of the European Union and the principle of *non-refoulement*.<sup>165</sup>

On March 27, 2020, the Council of Europe published a note regarding the rights applicable at the external borders, for the purpose of providing guidance to Member States when adopting measures to contain the COVID-19 outbreak.<sup>166</sup>

Migrant arrivals in Greece and Italy have been decreasing, but Greek hotspots are overflowing with people.<sup>167</sup> Taking into account the severity of the situation and the fact that unaccompanied minors are the most vulnerable, on March 4, 2020, the EU Commission called on Member States to show solidarity to Greece by finding a solution for at least 1600 unaccompanied minors.<sup>168</sup> The Commission also proposed

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158. See Nasar Meer & Leslie Villegas, *The Impact of Covid-19 on Global Migration 4* (Governance Loc. Integration Migrants Eur. Refugees, Working Paper No. 69344, 2020) [hereinafter Meer & Villegas].

159. See *id.* at 10.

160. See *id.* at 25.

161. Anja Radjenovic, *Tackling the Corona Virus Outbreak: Impact on Asylum-Seekers in the EU*, EUR. PARL. Doc. P.E. 649.390 at 1, (Apr. 2020), [https://ec.europa.eu/echo/what/civil-protection/mechanism\\_en](https://ec.europa.eu/echo/what/civil-protection/mechanism_en).

162. Regulation 2016/399 of Mar. 9, 2016, On Union Code on Rules Governing Movement Persons Across Borders (Schengen Border Code), 2016 O.J. (L 77) 1, 2.

163. See Radjenovic, *supra* note 161, at 2.

164. See *id.* at 3.

165. See Alexandra Popescu, *The EU "Costs" of the Refugee Crisis*, 10 EUROPOLITY 105, 110 (2016).

166. Radjenovic, *supra* note 161, at 3.

167. *Id.*

168. *Id.* at 4.

measures to help Greece, which, from an EU Civil Protection Mechanism, range from its purpose “to strengthen cooperation between the EU Member States . . . in the field of civil protection, with a view to improve prevention, preparedness and response to disasters[,]” to a big increase in funding to build other reception and identification centers in Greek islands.<sup>169</sup>

With Member States closing their borders and ports to migrants, suspending asylum procedures and introducing mandatory confinement in asylum reception centers, the EU Commission issued guidance on the implementation of relevant EU rules on asylum and return policies.<sup>170</sup>

It must be underlined that, even though some intern and regional human rights instruments allow States to derogate from their international obligations in certain circumstances, certain human rights, such as freedom from torture, are absolute and cannot be limited—even in cases of public health emergencies.<sup>171</sup>

“Protective measures must never result in inhuman or degrading treatment of person deprived of their liberty.”<sup>172</sup>

#### IV. COVID-19 PANDEMIC AS AN UNLAWFUL EXCEPTION TO THE PRINCIPLE OF NON-REFOULEMENT?

This world-wide pandemic has brought many States to enact border closures and restrictions on the entry of non-nationals in their territories.<sup>173</sup> Even if the measures appear necessary to combat a global threat, they often constitute an obstacle to individuals seeking international protection.<sup>174</sup> States have an absolute right to regulate the entry of aliens at their borders, but still have a positive obligation to ensure protection to individuals claiming to be a risk or persecution<sup>175</sup> by means of an individual determination,<sup>176</sup> and by ensuring they are not refouled or denied entry at the borders.<sup>177</sup>

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169. *EU Civil Protection Mechanism*, EUR. COMM’N., [https://ec.europa.eu/echo/what/civil-protection/mechanism\\_en](https://ec.europa.eu/echo/what/civil-protection/mechanism_en) (last updated Apr. 5, 2020); *Assistance to Greece in Response Increased Migration Pressure Immediate Measures Context COVID-19 Outbreak Support Post-Earthquake reconstruction Albania Other Adjustments*, at 3–4, COM (2020) 145 final (Mar. 27, 2020).

170. Radjenovic, *supra* note 161, at 5.

171. *Id.*

172. *Statement of Principles Relating to the Treatment of Persons Deprived of Their Liberty in the Context of the Coronavirus Disease (COVID-19) Pandemic*, EUR. COMM. FOR THE PREVENTION OF TORTURE AND INHUMANE OR DEGRADING TREATMENT OR PUNISHMENT (Mar. 20, 2020), <https://rm.coe.int/16809cfa4b> (last visited Sept. 10, 2020).

173. Meer & Villegas, *supra* note 158, at 4.

174. *Id.* at 23–24.

175. *Key Legal Considerations*, *supra* note 116, at 1.

176. *HANDBOOK*, *supra* note 21, at 12.

177. *Key Legal Considerations*, *supra* note 116, at 1.

International treaties allow States to derogate their international obligations in certain circumstances. Article 33(2) of the 1951 Convention provides an exception to the principle of *non-refoulement* if the refugee is deemed to be a danger for the security of the host State or if he has committed a serious crime.<sup>178</sup> Article 4(1) of the ICCPR<sup>179</sup> and Article 15(1) of the European Convention of Human Rights (ECHR)<sup>180</sup> provide the opportunity for a State to derogate from some of its international obligations if the measures implemented are non-discriminatory and consistent with other obligations under international law. Commenting on Article 4 of the ICCPR, the UN Human Rights Committee stated that “[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature”<sup>181</sup> and that “the situation must amount to a public emergency which threatens the life of the nation.”<sup>182</sup> However, even if the principle of *non-refoulement* does not appear to be absolute, the European Court of Human Rights has considered the principle a component of the prohibition of torture stating the absolute nature of *non-refoulement* under human rights law, even in

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178. 1951 Convention, *supra* note 9, art. 33, ¶ 2.

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Id.*

179. ICCPR, *supra* note 74, art. 4.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

*Id.*

180. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221.

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

*Id.*

181. U.N. Hum. Rts. Comm. (HRC), Comment 29: States of Emergency (Article 4), at 2, U.N. Doc. CCP/C/21/Rev.1/add.11 (2001).

182. *Id.*

cases of public health emergencies.<sup>183</sup> The principle of *non-refoulement* is also considered *jus cogens* under customary law and as such not subject to any derogation.<sup>184</sup>

From the United States to Europe, during the COVID-19 pandemic the right of asylum has been basically suspended.<sup>185</sup> Forced returns and push backs, including at sea, have been reported worldwide.<sup>186</sup>

In the United States, since March 20, 2020 when the EIFO was issued, thousands of migrants seeking international protection have been expelled within few hours from their arrival at the border.<sup>187</sup> Human Rights First published a report in May, stating that more than 1000 unaccompanied minors were forcibly returned to Mexico where they will likely face persecution.<sup>188</sup>

In June, several non-profit organizations filed a suit against the United States federal government on behalf of a thirteen-year-old migrant girl from El Salvador who was expelled without proper process.<sup>189</sup> The suit represents a challenge to the government's unprecedented order for restricting immigration along the Canadian and Mexican borders in the name of public health.<sup>190</sup> Notwithstanding her clear declaration of fear of returning to El Salvador and lack of any putative symptoms of COVID-19, the girl was not afforded due process.<sup>191</sup> The EIFO not only violates international law but is also arbitrary from a public health standpoint.<sup>192</sup>

In Greece, asylum procedures were suspended for a month, starting March 1, 2020 as a consequence of tensions with Turkey, due to a rapid increase in people trying to cross the border.<sup>193</sup> The decree suspending access to asylum for people who irregularly entered the country urged for new arrivals to be immediately deported either to country of origin or transit (Turkey).<sup>194</sup> This suspension was consequently extended until

183. *Chahal v. United Kingdom*, App. No. 70/1995/576/662, 23 Eur. Ct. H.R. 79-80 (1996).

184. *Principle of Non-Refoulement*, *supra* note 10, ¶ 3.

185. *Meer & Villegas*, *supra* note 158, at 2.

186. *Id.* at 3-4, 10; see also *Greece: Grants Asylum Access to New Arrivals*, *supra* note 8.

187. *Meer & Villegas*, *supra* note 158, at 7-8.

188. See Kennji Kizuka, Eleanor Acer & Rebecca Gendelman, *Pandemic as a Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger*, HUM. RTS. FIRST, at 2 (May 2020), <https://www.humanrightsfirst.org/resource/pandemic-pretext-trump-administration-exploits-covid-19-expels-asylum-seekers-and-children> (discussing that over 1000 persons have been kidnapped, raped or assaulted after they returned).

189. Lorenzo Zazueta-Castro, *Civil rights orgs sue Trump administration over public health code expulsions*, MONITOR (June 11, 2020), <https://www.themonitor.com/2020/06/11/civil-rights-orgs-sue-trump-administration-public-health-code-expulsions>.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Greece: Grant Asylum Access to New Arrivals*, *supra* note 8.

194. *Id.*



May 15, 2020.<sup>195</sup> During this period, no asylum applications were registered.<sup>196</sup> Ylva Johansson of the European Commission for Home Affairs notes that, although Greece has the right to secure its borders, the right to apply for asylum and the principle of *non-refoulement* should always be respected.<sup>197</sup> However, reports indicate that since the start of March several group of people have been summarily rejected by Greek authorities at its borders, including pushbacks at sea.<sup>198</sup> In the context of a public health emergency, it must be remembered that restriction on rights must always been “[l]awful, necessary and proportionate as well as nondiscriminatory.”<sup>199</sup>

In Italy, the process of asylum has been put on hold as well.<sup>200</sup> In April of 2020, after a ship operated by a German non-governmental organization (NGO) headed towards Italy, the government issued a decree declaring its ports unsafe: “[f]or the entire duration of the national health emergency caused by the spread of the COVID-19 virus, Italian ports cannot guarantee the requisites needed to be classified and defined as a place of safety.”<sup>201</sup> This decree basically had the effect of closing Italy’s borders to sea-rescue ships.<sup>202</sup> This decision was taken after a ship operated by a German NGO rescued 150 people and headed towards Italy.<sup>203</sup>

Those exceptional measures, implemented by States to curb the spread of the virus, are impacting asylum seekers heavily—often in violation of binding treaty obligations. Immigration policies have often hardened in times of crisis.<sup>204</sup> Charanya Krishnaswami, Amnesty International Advocacy Director for the Americas, writes that “[c]risis produces an instinct to close the border and keep people out,”<sup>205</sup> but COVID-19 and public health concerns could be used to mask

195. HELLENIC REP. MINISTRY OF MIGR. AND ASYLUM, IMPORTANT ANNOUNCEMENT SUSPENSION OF ALL ADMINISTRATIVE SERVICES TO THE PUBLIC BY THE ASYLUM SERVICE 15TH WILL CONTINUE UNTIL MAY (2020), <http://asylo.gov.gr/en/?p=5303>.

196. See Greece: *Grant Asylum Access to New Arrivals*, *supra* note 8.

197. *Id.*

198. UNHCR Calls on Greece to Investigate Pushbacks at Sea and Land Borders with Turkey, UNHCR (June 12, 2020), <https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html>.

199. Greece: *Grant Asylum Access to New Arrivals*, *supra* note 8.

200. Italy closes ports, *supra* note 14.

201. *Id.*

202. Lorenzo Tondo, Italy declares own ports ‘unsafe’ to stop migrants arriving, GUARDIAN (Apr. 8, 2020), <https://www.theguardian.com/world/2020/apr/08/italy-declares-own-ports-unsafe-to-stop-migrants-disembarking>.

203. *Id.*

204. Jack Herrera & Quito Tsui, Could Covid-19 Mean the End of Asylum Law in the US? NATION (June 3, 2020), <https://www.thenation.com/article/politics/coronavirus-refugee-asylum-law>.

205. *Id.*

xenophobia.<sup>206</sup> Historically, concerns relating to health and threat of containment have already been used to justify the enforcement of new restrictive immigrations policies.<sup>207</sup> The bubonic plague in San Francisco led to the Chinese Exclusion Act of 1882, while medical checks held in Ellis Island were a tool to summarily deport those considered diseased or disabled.<sup>208</sup> Since the start of the pandemic, politicians in Europe and North America have taken parallel action between migrants and disease, painting irregular immigrants as threats to the containment of the virus.<sup>209</sup> There is the suspect that those restrictive measures are not truly intended to protect public health, but are part of a recent trend of governments all around the world of trying to limit immigration and asylum.<sup>210</sup>

“The fear is these measures will be in place long after pandemic ends.”<sup>211</sup>

## V. CONCLUSION

The borders’ exceptional measures, adopted by the United States and many countries in the European Union, constitute a violation of domestic and international law by repudiating the commitment to the crucial principle of *non-refoulement*.<sup>212</sup>

“States can and should ensure access to asylum while also protecting public health” is the first and probably most fundamental “key protection message” diffused by the UNHCR.<sup>213</sup> Countries all around the world should respond to the pandemic by including provisions which take into consideration all those looking for international protection.<sup>214</sup> The UNHCR also prescribes the observance of the criteria of proportionality with regard to the principle of *non-refoulement*.<sup>215</sup> This means that the measures adopted to manage risk to public health that could arise with the arrival of individual looking for protection must be necessary, legitimate, and non-discriminatory, so as not to target particular vulnerable groups of people.<sup>216</sup> States, for example, may adopt health screenings and testing upon entry, measures that may not result in a denial of the right of asylum or in *refoulement*.<sup>217</sup> The States’ responses

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206. *Id.*

207. *Id.*

208. *Id.*

209. Herrera & Tsui, *supra* note 204.

210. *Id.*

211. *Id.*

212. *Id.*

213. Press Release, *supra* note 125, at 1.

214. Covid-19: *The Effect on Refugees*, CLEARY GOTTlieb 1, 1, <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/covid19-the-effect-on-refugees-pdf> (last updated Apr. 17, 2020).

215. *Id.* at 2.

216. *Id.* at 3.

217. *Id.*

to a pandemic must comply with human rights standards.<sup>218</sup> In order to guarantee the rights to individuals in need of international protection, entry in the territory of the country where they seek asylum must be allowed.<sup>219</sup> The United Nations Network on Migration also urges States to suspend forced returns during this time of crisis, and to guarantee human rights to all migrants, regardless of their migratory status.<sup>220</sup> Many governments have already included migrants in their response to the COVID-19 crisis by means of suspending forced returns, providing temporary residence and non-custodial alternatives: this appears to be the only effective way to protect migrants' rights, and at the same time, dampen xenophobia.<sup>221</sup>

International solidarity and burden sharing are necessary to help hosting States to pursue those inclusive responses.<sup>222</sup> As the UN Secretary General António Guterres has said, "COVID-19 is menacing the whole of humanity — and so the whole humanity must fight back. Individual country responses are not going to be enough."<sup>223</sup>

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218. U.N. COMM.'N ON MIGRANT WORKERS, Joint Guidance Note on the Impacts of COVID-19 Pandemic on the Human Rights of Migrants, at 1–2 (May 26, 2020), <https://reliefweb.int/report/world/joint-guidance-note-impacts-covid-19pandemic-human-rights-migrants>.

219. *Id.* at 2.

220. Press Release, U.N. Network on Migration, Forced Returns of Migrants Must be Suspended in Times of COVID-19, U.N. Press Release (May 13, 2020).

221. *Id.*

222. António Guterres, U.N. Secretary General, Secretary-General's Remarks at Launch of Global Humanitarian Response Plan for COVID-19 (March 22, 2020), in U.N. SEC'Y GEN., March 2020.

223. *Id.*